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To: Microsoft ATR
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Subject: Microsoft Settlement

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Ladies and Gentlemen:

In the interest of saving time, I'll begin with an executive summary. If those conclusions are all you need, you can skip the discussion.

SUMMARY

The proposed settlement in the Microsoft antitrust case is unacceptable, for at least the following reasons:

1. The prohibitions in section III are appropriate and well-intentioned, but suffer from loopholes that allow Microsoft to achieve the effect of the prohibited conduct through other means.

2. Additional constraints are needed to cover other areas which Microsoft uses to protect and extend its monopoly.

3. The Technical Committee as envisioned in the proposal is too weak to carry out its duties effectively.

4. The duration of the settlement is too short.

5. There is no penalty for Microsoft's illegal conduct. Without such a penalty, there is no reason to expect Microsoft (or other offenders) will avoid similar illegal conduct in the future.

6. A truly effective settlement requires much more stringent action now, in order to discourage more Microsoft conduct that is damaging to consumers as Microsoft expands into Internet commerce, entertainment, news, and reference information, as well as acting as a repository for vast amounts of personal data.

DISCUSSION

Concerning the provisions of Section III:

III.A is ineffective, because the volume discounts specifically allowed in III.B can be structured so as to make competing platform software economically infeasible. Microsoft has used similar tactics (e.g. per-CPU licensing) against competition in the past.

III.C will be ineffective as long as Windows continues to be structured so as to promote Microsoft products and services automatically and continually, no matter what changes an OEM may have applied to startup screens and menus. This technique is ubiquitous in Windows XP. (Try it; you'll find that the constraints in III.C.3 are already obsolete.)

III.D. To the extent that MSDN is a for-fee subscriber-only service, it is not acceptable as a distribution mechanism for the documentation described in this section, because the fee schedule and processing of subscription requests are subject to abuse. Microsoft has exploited precisely this technique in the past. Guaranteed open distribution, without fee, via a website, using data formats that are defined by non-proprietary specifications, would be a better approach. Also, it's not clear that the definition of "Timely Manner" is truly timely; a better one might be based on the completeness of the APIs involved, rather than the beta test of an entire operating

system product (which will not necessarily be in synchronization with the development of many of the APIs).

III.E. The definition of "Communication Protocol" is appallingly weak in a technical sense, leaving provision III.E essentially meaningless. The key requirement that you should be targeting here is that Microsoft must provide sufficient documentation for a third party to develop compatible non-Microsoft software for any software component participating in a transaction. A traditional network communication protocol may be a part of this process, but it can also be be made totally irrelevant, thus circumventing III.E.

III.F. Due to the loopholes afforded by III.F.2, it is not clear that there are any cases in which III.F.1 could be enforced. Also, III.F.1 specifically does not include critical Microsoft products such as Office, which are also used as instruments of retaliation.

III.H. The provisions of III.H.2 are excellent, however the loophole provided subsequently (in the second instance of III.H.2) renders them meaningless. Microsoft can designate irrelevant, but proprietary, functionality as a technical requirement, thus shutting out competing middleware. As an example, only a few weeks ago it blocked competing browsers from accessing msn.com on grounds that were later revealed to be specious.

III.I. This provision seems carefully designed to sabotage so-called Open Source software projects, which require the freedom to implement standards without royalties or sublicensing restrictions. If this provision is adopted as proposed, it could eliminate much of Microsoft's potential competition at a single stroke. As mentioned above for III.E, the key requirement here is that third parties (including Open Source developers) be able to develop compatible components for use in a Microsoft-based framework.

III.J. By invoking this provision, Microsoft can easily undo the effects of III.D, III.E, III.H, and III.I. The conditions under which Microsoft can do this may seem well-defined legally, but they are unsound in a software-engineering sense, and thus render much of Section III moot. This is a large topic which I would love to discuss at more length, but time does not permit that here.

Concerning issues not mentioned in Section III:

There is essentially no relief with respect to Microsoft Office, a critical tool Microsoft uses to maintain and extend its monopoly power. At the very least, the data file formats and data exchange protocols used by Office must be available under terms similar to those of the Windows Platform APIs. Otherwise, initiatives such as .NET (which involves tight integration with Office) will simply obsolete the provisions relating to the Windows Platform.

Similar comments apply to .NET itself.

Concerning the Technical Committee described in Section IV.B:

IV.B.2. TC members are required to be "experts in software design and programming," but cannot be employed by Microsoft or "any competitor" to Microsoft, and cannot subsequently be employed by Microsoft or a competitor. Given the scope of Microsoft's presence in the industry, you may find it difficult to find any software expert who is not employed by Microsoft or

a competitor. Even academic institutions could be construed as competitors if they are involved with Open Source software development, as is often the case.

IV.B.3. Microsoft selects one TC member, who then has one of two votes in selecting a third. If there was ever a case of the fox guarding the henhouse, this is it. I can imagine few more effective ways to render the TC toothless.

IV.B.9, IV.B.10. The lack of transparency in TC operations is disturbing. There is no way for outside entities (including parties who may have been wronged by Microsoft anticompetitive conduct in the future) to determine whether the TC is acting in good faith or even is well-informed.

Concerning the duration of the settlement:

Reviewing the past history of anticompetitive behavior by Microsoft, it is clear that five years is far too short a term.

Concerning penalties:

It is ASTOUNDING that the proposal does not include a meaningful penalty for Microsoft's past behavior. The inadequacy of the proposal must be obvious from this alone.

Through illegal actions, Microsoft has destroyed dozens of other companies that were true sources of innovation in the industry, artificially maintained (and in some cases even raised) high costs to consumers, and extended its monopoly power in PC operating systems to acquire other markets. To allow this behavior without consequence is clearly negligent.

Concerning the context of this case:

Today Microsoft enjoys nearly total dominance of the personal computer software market. Whether or not it achieved this dominance in a legal manner, it has been convicted of maintaining its monopoly illegally. It has certainly shown by its attempts to manipulate legal and political systems that it has no compunction about applying its ruthless competitive techniques in other venues.

Consider that Microsoft already has presences in other significant areas of American life: news distribution (MSNBC), entertainment (XBox), history and reference documents (Encarta). There have already been concerns about Microsoft abusing its power in some of these areas (particularly rewriting history in Encarta).

Consider that Microsoft is moving (through .NET) to establish a central control of business transactions throughout the Internet, and (through Passport) to a central control of personal credit and marketing data.

In most of these cases it is leveraging (in the non-legal sense) its monopoly to obtain critical advantages against competitors.

Consumers have already incurred significant damage from Microsoft's behavior. If we do not act now to establish an effective firewall against future illegal and unethical activity, I have no doubt that Microsoft will extend its influence to ever larger markets, while reducing the ability of consumers and of governments to limit its abuses.

CLOSING

In sum, I believe the proposed settlement would not be effective in constraining Microsoft's behavior, and probably would encourage future violations of law, as Microsoft would be aware that such violations carry few consequences. Perhaps we will find ourselves in court once again, after Microsoft has used its monopoly illegally to destroy yet more innovative companies; sabotage additional open, public standards; and establish more chokeholds on consumer access to digital information and services. Perhaps we will not, because next time Microsoft will have learned to manipulate the government as effectively as it now manipulates the computer industry.

Sincerely,

Allen Akin

Cc: California Senator Dianne Feinstein
California Attorney-General Bill Lockyer